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Nos. 86-622 and 86-737

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether a Veterans' Administration regulation that conclusively defines alcoholism as willful misconduct discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973?

2. Whether the federal courts have jurisdiction to consider a challenge to the validity of a Veterans' Administration regulation that violates § 504 of the Rehabilitation Act of 1973?

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

This brief is submitted on behalf of Eugene Traynor, petitioner in No. 86-622, and James P. McKelvey, petitioner in No. 86-737. Mr. Traynor seeks the reversal of a decision of the United States Court of Appeals for the Second Circuit; Mr. McKelvey seeks

the reversal of a portion of a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the Second Circuit in *Traynor* are reported at 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-38a). The opinion of the district court is reported at 606 F. Supp. 391 (S.D.N.Y. 1985) (*Traynor* Cert. Pet. 39a-82a).

The majority and dissenting opinions of the D.C. Circuit in *McKelvey* are reported at 792 F.2d 194 (D.C. Cir. 1986) (*McKelvey* Cert. Pet. 1a-31a). The opinion of the district court is reported at 596 F. Supp. 1317 (D.D.C. 1984) (*McKelvey* Cert. Pet. 32a-47a).

JURISDICTION

The judgment of the Court of Appeals in *Traynor* was entered on May 16, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on July 15, 1986. (*Traynor* Cert. Pet. 1a, 81a.) Mr. Traynor's petition for writ of certiorari was filed on October 14, 1986.

The judgment of the Court of Appeals in *McKelvey* was entered on May 30, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on August 7, 1986. (*McKelvey* Cert. Pet. 48a, 49a, 50a.) Mr. McKelvey's petition for writ of certiorari was filed on November 5, 1986.

Both petitions for certiorari were granted on March 9, 1987. J.A. 132. The jurisdiction of this Court in

both cases is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 92 Stat. 2982, 2987 (1978), 29 U.S.C. § 794 (1982), provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States, as defined in § 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency . . . .

Section 7(8) of the Rehabilitation Act of 1973, 92 Stat. 2984, 2985 (1978), 29 U.S.C. § 706(8) (1982), defines "individual with handicaps" as follows:

> (A) Except as otherwise provided in subparagraph (B), the term 'individual with handicaps' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.
>
> (B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person

> who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Time limitations for using veterans' educational benefits are established by 91 Stat. 1439 (1977), 38 U.S.C. § 1662(a)(1) (1982), which provides in pertinent part:

> No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall . . . be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was so pre-

vented from initiating or completing such a program of education.

Jurisdiction to review certain Veterans' Administration decisions is limited by 84 Stat. 787, 790 (1970), 38 U.S.C. § 211(a) (1982), which provides as follows:

> (a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The term "willful misconduct" is defined generally under Veterans' Administration regulations at 38 C.F.R. § 3.1(n) (1986):

> "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and

> reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

More specifically, a Veterans' Administration regulation codified at 38 C.F.R. § 3.301(c)(2) (1986) ("the willful misconduct regulation"), has been interpreted by the VA to define alcoholism as willful misconduct:

> The simple drinking of alcoholic beverage is not itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

STATEMENT OF THE CASES

No. 86-622. Eugene Traynor is a veteran who began drinking to intoxication before he was ten years old. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 41a). His

drinking became progressively worse, and while on active duty in the Army in 1968 and 1969 he suffered both seizures and disciplinary sanctions because of his alcoholism. He was honorably discharged from the Army on August 27, 1969. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 42a-44a).

Between 1970 and 1974, Mr. Traynor was hospitalized repeatedly for alcoholism and related illnesses, and was diagnosed as having "primary" alcoholism, a term used by the Veterans' Administration ("VA") to denote alcoholism without an underlying psychiatric disorder. *Id.* During that time, his active alcoholism made it impossible for him to pursue any education, or to use veterans' educational assistance benefits to which he was entitled under 38 U.S.C. § 1661 (1982).

In 1974, following his last hospitalization, Mr. Traynor succeeded in overcoming his alcoholism. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 46a). From 1977 until 1979, he attended college part-time, and used nine and one half of the 24 months of veterans' benefits to which he was entitled. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 47a-49a). His original ten-year delimiting period for using those benefits expired on August 27, 1979. *See* 38 U.S.C. § 1662(a)(1) (1982).

In early 1979, Mr. Traynor applied for an extension of time to use his remaining benefits on the ground that his alcoholism had prevented him from pursuing his education until 1977. *See id.* Because the disability that delayed his education—"primary" alcoholism—is conclusively deemed as "willful misconduct" by the VA pursuant to 38 C.F.R. § 3.301(c)(2) (1986)[1], the

[1] *See* p. 6 *supra*. This regulation is referred to throughout this brief as "the willful misconduct regulation."

VA denied the extension. 606 F. Supp. at 395 (*Traynor* Cert. Pet. 49a-50a); *see also id.* at 88a-89a (VA Rating Decision). His benefits were terminated on August 27, 1979.

Mr. Traynor appealed to the Board of Veterans' Appeals ("Board" or "BVA"). He argued, among other things, that the VA's classification of alcoholism as willful misconduct ignored established medical authority that alcoholism is an illness rather than deliberate conduct, and that the willful misconduct regulation violated the Constitution and the nondiscrimination mandate of the Rehabilitation Act. (*Traynor* Cert. Pet. 148a-149a; R. 8 (8/1/80 Hearing Tr. at 10-11, 15-22, 25-26, 28-30, 34-35)). Without even acknowledging these contentions, the Board denied his appeal on December 17, 1980. (*Traynor* Cert. Pet. 91a-102a).

On Mr. Traynor's motion for reconsideration, the Board again denied the appeal. (*Traynor* Cert. Pet. 103a-121a). The Board stated that it was not "the proper forum" for his constitutional and statutory challenges to the validity of the willful misconduct regulation, and concluded that it was "bound . . . by regulations of the Veterans Administration." (*Traynor* Cert. Pet. 107a-108a, 116a).

Mr. Traynor then brought an action for declaratory and related relief in the United States District Court for the Southern District of New York. He claimed that the willful misconduct regulation and its conclusive classification of "primary" alcoholism as "willful misconduct" were contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), as well as the Fifth Amendment to the Constitution . J.A. 8.

On cross-motions for summary judgment, the district court ruled that it had jurisdiction to review Mr. Traynor's challenges to the willful misconduct regulation, notwithstanding 38 U.S.C. § 211(a) (1982). 606 F. Supp. at 395-96 (*Traynor* Cert. Pet. 53a-59a). While finding that the regulation withstood constitutional scrutiny, 606 F. Supp. at 396-98 (*Traynor* Cert. Pet. 59a-65a), the district court recognized that the regulation's conclusive classification of "primary" alcoholism as "willful misconduct," which "exclud[ed] those with a history of primary alcoholism from consideration for extensions of delimiting dates[,] contravene[d] the Rehabilitation Act by discriminating against those rehabilitated alcoholics . . . most deserving of aid" solely on the basis of their handicap. 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a-81a). Declaring the regulation invalid under § 504 of the Rehabilitation Act, the court remanded the case to the VA for further proceedings. (*Traynor* Cert. Pet. 83a-84a).

On appeal, a divided panel of the Second Circuit reversed, holding that 38 U.S.C. § 211(a) precluded judicial review of Mr. Traynor's statutory challenge. The majority assumed that Mr. Traynor sought to overturn the VA's *application* of the challenged regulation to the facts of his case, and read § 211(a) to immunize from judicial review "all decisions of the VA on 'any question of law or fact.' " 791 F.2d at 229 (*Traynor* Cert. Pet. 13a). The Second Circuit therefore declined to reach the merits of the Rehabilitation Act claim. 791 F.2d at 226-231 (*Traynor* Cert. Pet. 1a-25a).

In dissent, Judge Kearse pointed out that, contrary to the majority's broad reading of the statutory lan-

guage, § 211(a) "immunizes from judicial review . . . only decisions of the VA on a 'question of law or fact *under any law administered by the Veterans' Administration providing benefits for veterans,*' " 791 F.2d at 232 (*Traynor* Cert. Pet. 29a) (emphasis in original). She concluded for two reasons that § 211(a) does not deprive the federal courts of jurisdiction to determine whether the willful misconduct regulation violates § 504:

> First, this question is not one that arises under a law that is administered by the VA or that provides benefits for veterans; rather it arises under the Rehabilitation Act, which does not provide veterans' benefits and is not administered by the VA. Second, the Administrator did not in fact decide this question but rather disclaimed jurisdiction to decide it.

791 F.2d at 232 (*Traynor* Cert. Pet. 28a-29a.)

No. 86-737. James P. McKelvey is a recovered alcoholic who began drinking at age 13. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). During his enlistment in the United States Army, he received several disciplinary sanctions, all of which were drinking-related. Mr. McKelvey was honorably discharged from the Army in September, 1966.

In the nine years after his discharge, Mr. McKelvey was hospitalized repeatedly for alcoholism and related problems. 792 F.2d at 187 (*McKelvey* Cert. Pet. 4a). Between hospitalizations, Mr. McKelvey attended two educational institutions, using veterans' educational benefits. 38 U.S.C. § 1661 (1982). He was unable to complete his education because of the debilitating ef-

fects of his alcoholism. R. 8 (transcript of July 1980 BVA hearing). Mr. McKelvey had his last drink of alcohol in May 1975. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). He subsequently received regular psychiatric treatment. R. 8 (transcript of July 1980 BVA hearing).

On September 10, 1976, the ten-year delimiting date for use of Mr. McKelvey's educational benefits passed. In 1977, pursuant to 38 U.S.C. § 1662(a)(1) (1982), he sought an extension of his delimiting date on the ground that his alcoholism had prevented earlier use of his benefits. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). His request was denied by the VA, which determined that Mr. McKelvey's disability had resulted from "willful misconduct." The VA's determination was based exclusively upon the willful misconduct regulation. *Id.* (*McKelvey* Cert. Pet. 4a-5a).

Mr. McKelvey appealed the VA's decision. In July 1980, at the Board of Veterans' Appeals hearing on Mr. McKelvey's case, the Chairman stated:

> I want to make one thing clear . . . I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is defined in the regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations . . . .

J.A. 83-84. Because the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism," it was thus bound by regulation

to hold that Mr. McKelvey's alcoholism was "willful," and it denied an extension. 792 F.2d at 197 (*McKelvey* Cert. Pet. 5a); *see* J.A. at 100-03, 114.

Mr. McKelvey challenged the Board's decision in the United States District Court for the District of Columbia. Mr. McKelvey raised both constitutional and statutory issues, including a claim that the willful misconduct regulation violated § 504 of the Rehabilitation Act, as amended, 29 U.S.C. § 794 (1982) . The VA argued that 38 U.S.C. § 211(a) (1982) precluded judicial review. Judge Parker disagreed, stating that Mr. McKelvey did not "seek review of any factual findings of the Veterans Administration," but rather "a judicial determination that a regulation promulgated by the VA is contrary to § 504 of the Rehabilitation Act." 596 F. Supp. at 1320 (*McKelvey* Cert. Pet. 35a-36a). Judge Parker then granted summary judgment for Mr. McKelvey on the Rehabilitation Act claim, and remanded the case to the VA to consider whether Mr. McKelvey's alcoholism constituted willful misconduct within the meaning of 38 U.S.C. § 1662(a)(1) (1982). *Id.* at 1323-25 (*McKelvey* Cert. Pet. 41a-46a).

The VA sought review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit noted that the VA initially had not contested the district court's finding of jurisdiction, and quoted from the VA's brief:

> McKelvey did not make a Rehabilitation Act claim before the Board of Veterans Appeals; and it is not clear that the Board would have had authority to consider such a claim had

> he made it. We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider.

729 F.2d at 198 (*McKelvey* Cert. Pet. 7a).

At oral argument, the court invited the parties to address, among other things, whether the VA had authority to consider the Rehabilitation Act claim. In response, the VA submitted a letter from its General Counsel announcing for the first time the VA's official conclusion that the Rehabilitation Act does not invalidate the conclusive presumption of the willful misconduct regulation that "primary" alcoholism is in all cases willful misconduct. 792 F.2d at 198-199 (*McKelvey* Cert. Pet. 7a). The VA then asserted that the General Counsel's letter was a decision of the Administrator, which, having been made in the course of a benefits determination, was insulated from review under § 211(a). *Id.* (*McKelvey* Cert. Pet. 7a-8a).

The D.C. Circuit rejected the VA's belated reversal of position:

> [T]hroughout this two and one-half year judicial proceeding, the VA now argues, it has held a trump card up its sleeve: even after the parties and two courts have expended the resources necessary for full and fair litigation, the VA, simply by releasing an official pronouncement on the matter *sub judice*, can preempt the judicial process, and convert the District Court's judgment into a declaration that merely advises, but does not control the agency.

> We are confident that Congress never envisioned such a gambit when it provided that veterans benefits claims should start and finish at the administrative level without coming to court at all. Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation. . . .

792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). The D.C. Circuit therefore concluded that it had jurisdiction over this case because the VA had "left a potentially dispositive question undecided." *Id.*[2]

On the merits of the Rehabilitation Act claim, Judges Starr and Scalia concluded that the willful misconduct regulation did not violate § 504 of the Rehabilitation Act. 792 F.2d at 199-203 (*McKelvey* Cert. Pet. 9a-16a). Judge Ginsburg dissented. *Id.* at 203-09 (*McKelvey* Cert. Pet. 17a-29a).

The majority reasoned that the willful misconduct regulation merely regulates the distribution of benefits on the basis of conduct. It held that the VA had reasonably defined alcoholism as a "willfully caused handicap," *id.* at 200 (*McKelvey* Cert. Pet. 11a), and stated that it was "initially the VA's responsibility, and not ours, to determine what is 'willful misconduct.' " *Id.* at 201 (*McKelvey* Cert. Pet. 13a). The majority concluded that the willful misconduct regulation "is a permissible means of discriminating among those suffering from alcoholism on the basis of their *conduct*." *Id.* (emphasis in original). In so holding, the

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[2] Judge Scalia dissented from the court's holding with respect to jurisdiction, but because the court assumed jurisdiction he addressed the merits of the Rehabilitation Act question. 792 F.2d at 209 (*McKelvey* Cert. Pet. 30a).

majority explicitly recognized that its decision conflicted with *Tinch v. Walters* 765 F.2d 599 (6th Cir. 1985), in which the Sixth Circuit, facing the identical issue, had held that the willful misconduct regulation violates § 504. 792 F.2d at 201 n.4 (*McKelvey* Cert. Pet. 13a n.4).

In dissent, Judge Ginsburg examined the requirements for relief under § 504, and concluded that Mr. McKelvey satisfied each of them. She noted initially that alcoholics are "handicapped" under the Act, that the veterans' educational assistance program is subject to § 504, and that Mr. McKelvey is "otherwise qualified" to participate in the VA's educational benefit program. 792 F.2d at 204 (*McKelvey* Cert. Pet. 18a-19a). She then demonstrated that the majority's conclusion was wrong, noting that although the VA had purported to define alcoholism to be willful misconduct, Congress has deemed it to be a handicap under the Rehabilitation Act. She thus concluded that the VA's regulation discriminated on the basis of handicap. She observed that "under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies Section 504 coverage of alcoholics." 792 F.2d at 205 (*McKelvey* Cert. Pet. 21a).

SUMMARY OF ARGUMENT

This brief addresses two questions. The principal question, raised in both cases, is whether the willful misconduct regulation discriminates against alcoholics in violation of § 504 of the Rehabilitation Act. The second question, raised only in *Traynor*, concerns a

jurisdictional issue: whether judicial review of the willful misconduct regulation is barred by 38 U.S.C. § 211(a) (1982), which explicitly bars only judicial review of certain VA decisions. With respect to the latter question, the D.C. Circuit in *McKelvey* concluded that the VA had never made a "decision" that might defeat jurisdiction, and therefore held that jurisdiction existed. 792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). In its brief in opposition to the petition for writ of certiorari, the VA did not challenge the D.C. Circuit's conclusion. Brief for Respondents in Opposition 12-13. Thus, regardless of how it resolves the jurisdictional issue, the merits of the Rehabilitation Act issue are squarely presented in *McKelvey*.

The principal issue before the Court is whether the willful misconduct regulation discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). This question should be answered in the affirmative, for several reasons.

First, the proper § 504 analysis clearly demonstrates that the regulation is discriminatory. Petitioners are "individuals with handicaps" who were denied benefits available under a federal program only because the VA's willful misconduct regulation defines their handicap—alcoholism—to be willful misconduct.

Second, the D.C. Circuit's decision in *McKelvey* would potentially remove all alcoholics from the protection of the Rehabilitation Act, a result clearly contrary to Congressional intent. The D.C. Circuit majority concluded that the VA had reasonably determined that alcoholism is a willfully caused disability, and therefore that the willful misconduct regulation discriminates against alcoholics not on the

basis of their alcoholism, but on the basis of their conduct. This conclusion impermissibly separates the physical act of drinking from the causative condition, alcoholism, and cannot serve as the basis for allowing discrimination against alcoholics, which is prohibited by the Rehabilitation Act.

In addition, the D.C. Circuit's decision conflicts with this Court's recent decision in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987) . In *Arline*, the Court observed that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129. The willful misconduct regulation was upheld by the D.C. Circuit majority in part because it reflects "general societal perceptions regarding personal responsibility."[3] These "societal perceptions," if they exist, conflict with the definition of alcoholism Congress adopted as federal law in the Rehabilitation Act, and therefore, under *Arline*, cannot stand.

The second issue before the Court is the jurisdictional one, which is squarely raised only by *Traynor*. Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), deprives the federal courts of jurisdiction to review certain "decisions of the Administrator" under statutes affording veterans' benefits. But it does not deprive the federal courts of jurisdiction to review claims that such VA regulations violate other federal laws. Here, petitioners' challenges are based on the Rehabilitation Act of 1973, which, as amended in 1978, prohibits all government agencies, including the VA, from discriminating against any individual on the basis of handicap. Ju-

[3] 792 F.2d at 201 (*McKelvey* Cert. Pet. 12a).

dicial review in these circumstances is permitted because § 211(a) bars only challenges to decisions "*under [a] law* administered by the Veterans' Administration *providing benefits to veterans* . . . ." 38 U.S.C. § 211(a) (emphasis added). Petitioners' challenge arises under a statute that provides protection to the handicapped—not benefits to veterans—and calls for an interpretation of a body of law entirely separate from the Veterans' Benefits Law.

In addition, § 211(a) does not apply to petitioners' cases because there was no "decision of the Administrator" on the question of law raised by these challenges. Throughout the administrative proceedings below, the VA consistently refused to decide whether the willful misconduct regulation conflicts with § 504 of the Rehabilitation Act. The VA's position was that it was bound by the willful misconduct regulation, and could not consider its validity under other laws.

Nor can it be argued that VA regulations themselves are "decisions," and therefore immune from review. Neither the language of the statute itself, available evidence of contemporary Congressional intent, or subsequent Congressional actions provides any indication that Congress intended § 211(a) to bar review of generally-applicable regulations.

Finally, permitting judicial review of the regulation would promote the goals of the Rehabilitation Act without thwarting the purposes of § 211(a). Allowing petitioners' challenge to be heard would also comport with decisions of this Court which have established that judicial review is available where, as here, an agency has refused to rule on an important issue, or where an important and overriding issue is raised which is not within the agency's special expertise.

ARGUMENT

I. THE WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

Nine federal judges have considered whether the willful misconduct regulation violates § 504 of the Rehabilitation Act. Seven of these judges have ruled that the willful misconduct regulation cannot stand.[4] Only the D.C. Circuit majority in *McKelvey* has disagreed.

The discussion below will demonstrate that the willful misconduct regulation manifestly violates § 504, and that the Rehabilitation Act analysis of the D.C. Circuit majority in *McKelvey* was flawed. Moreover, the recent decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), requires the reversal of the D.C. Circuit's decision.

A. The Willful Misconduct Regulation Clearly Violates § 504 Of The Rehabilitation Act

In determining whether § 504 has been violated, a court must determine (1) whether the plaintiff is an "individual with handicaps" under the Act; (2) whether he is "otherwise qualified" for the benefits from which he has been excluded; (3) whether he has been excluded "solely" because of his handicap; and (4) whether the program from which he has been

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[4] *See* McKelvey v. Walters, 596 F. Supp. 1317 (D.D.C. 1984), *rev'd sub nom.* McKelvey v. Turnage, 792 F.2d 194, 203 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (*McKelvey* Cert. Pet. 1a-46a); *Traynor v. Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985), *rev'd on other grounds*, 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-82a); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985).

excluded is subject to § 504.[5] *See McKelvey v. Turnage*, 792 F.2d at 204 (*McKelvey* Cert. Pet. 17a-18a); *see also School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1127, 1130-31 (1987) (examining meaning of "handicapped individual" and "otherwise qualified"). Applying this analysis, Judge Parker in *McKelvey* and Judge Cooper in *Traynor* correctly concluded that the willful misconduct regulation violates § 504 of the Rehabilitation Act. *Traynor*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 66a-79a); *McKelvey*, 596 F. Supp. at 1323-24 (*McKelvey* Cert. Pet. 43a-44a).

There is no dispute that alcoholism is a handicap under § 504. This is confirmed by the 1978 amendments to the Rehabilitation Act, which added a provision now codified at § 7(8)(B) of the Act, 29 U.S.C. § 706(8)(B) , removing alcoholics from the Act's coverage for employment purposes if their condition would preclude the safe performance of a particular job. The clear import of this language is that for other purposes, such as educational benefits, Congress intended alcoholics to enjoy the protections of the Rehabilitation Act. *See School Board of Nassau County v. Arline*, *supra*, 107 S. Ct. at 1130 n.14 . As a result, every judge who has considered the issue now before the Court has recognized that alcoholism is a handicap

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[5] These elements are derived from the plain language of § 504:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794 (1982).

under § 504. *See Traynor v. Walters*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 67a-74a); *McKelvey v. Walters*, 596 F. Supp. at 1323, *rev'd on other grounds sub nom. McKelvey v. Turnage*, 792 F.2d at 202 n.5, 204 (*McKelvey* Cert. Pet. 14a n.5, 18a, 43a); *Tinch v. Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599, 602 (6th Cir. 1985).[6] The VA has never, throughout the course of this litigation, contested that petitioners are handicapped individuals under the Act.

Nor can it be disputed that petitioners are "otherwise qualified" individuals within the meaning of the Rehabilitation Act. *See* 606 F. Supp. at 400 (*Traynor* Cert. Pet. 74a-76a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). As this Court has recently noted, the "basic factors to be considered in conducting [an inquiry into whether a person is otherwise qualified] are well established." *School Board of Nassau County v. Arline*, 107 S. Ct. at 1131. "An 'otherwise qualified' handicapped person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). "[W]ith regard to

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[6] The Attorney General of the United States has reviewed the legislative history of § 504 and concluded that alcoholics are handicapped individuals. 43 Op. Att'y Gen. 12 at 2 (April 12, 1977). Subsequently, the predecessor of the Department of Health and Human Services issued guidelines reflecting this conclusion, 43 Fed. Reg. 2137 (1978), and the VA adopted those guidelines by regulation. 38 C.F.R. § 18.403(j)(2)(i)(C) (1986) . Several other courts have recognized that alcoholics are handicapped under § 504. *See, e.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Whittiker v. Board of Higher Education, 461 F. Supp. 99, 106 n.7 (E.D. N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791, 796-97 n.4 (E.D. Pa. 1978).

educational benefits, the term 'otherwise qualified' denotes one who 'meets the academic and technical [*i.e.*, non-academic] standards requisite to admission or participation' with respect to educational programs."[7] *Traynor*, 606 F. Supp. at 400 and n.5 (*Traynor* Cert. Pet. 75a-76a and n.5) (citing original HEW regulations coordinating federal agency enforcement of § 504 and 38 C.F.R. § 18.403(k) (1986) (VA regulations implementing § 504)). Here, the VA has not disputed that Mr. McKelvey and Mr. Traynor were able to pursue a course of study at the time they applied for extensions of their delimiting dates.

Both district courts correctly concluded that the willful misconduct regulation discriminated against petitioners solely on the basis of their handicap. 606 F. Supp. at 400 (*Traynor* Cert. Pet. 76a-77a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). The Chairman of the Board of Veterans Appeals at Mr. McKelvey's hearing had stated: "As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease." J.A. 83. Judge Parker noted that by precluding the presentation of evidence "causally related to his handicap," the Board of Veterans Appeals had denied Mr. McKelvey any opportunity to overcome

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[7] In *Southeastern Community College v. Davis*, *supra*, the Court noted that regulations promulgated by the Department of Health, Education and Welfare to interpret § 504 state that a " '[q]ualified handicapped person' is, '[w]ith respect to secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity.' " 442 U.S. at 406 (*quoting* 45 C.F.R. § 84.3(k)(3) (1978) (now administered by the Department of Health and Human Services)).

the presumption of willful misconduct. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). Judge Parker noted that other individuals, in contrast to alcoholics, are afforded an opportunity to demonstrate that they qualify for a delimiting date extension. *Id.*

Finally, there can be no question that the program from which petitioners were excluded is subject to § 504. Section 504 explicitly states that it covers "any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency." 29 U.S.C. § 794 (1982). The VA has not disputed that the Rehabilitation Act applies to the VA's educational benefits program. *Traynor*, 606 F. Supp. at 400 (*Traynor* Cert. Pet. 77a-78a).

The reasoning of both district courts and the five other judges who reached the same conclusion makes it clear beyond dispute that the willful misconduct regulation violates § 504 of the Rehabilitation Act. The D.C. Circuit majority in *McKelvey* reached a different result, and the next section will demonstrate that its reasoning was flawed and inconsistent with the decisions of this Court, and therefore should be reversed.

B. The Analysis Of The D.C. Circuit Was Incorrect, And Would Deprive All Alcoholics Of The Protections Of The Rehabilitation Act.

The decision of the D.C. Circuit majority in *McKelvey* rests on an improper analysis which negates the protections provided alcoholics under § 504 of the Rehabilitation Act of 1973. The majority concluded that the willful misconduct regulation simply categorizes a class of handicapped individuals on the basis of their conduct, and that discrimination on the basis

of conduct is permissible. 792 F.2d at 202 (*McKelvey* Cert. Pet. 14a). In reaching this conclusion, the majority noted that most medical experts recognize alcoholism to be a disease; a few do not. 792 F.2d at 200-01 (*McKelvey* Cert. Pet. 11a). *See* J.A. 34, 39-41 (Affidavit of Anne Geller); J.A. 56, 61-63 (Affidavit of Sheldon Zimberg). The majority observed that this absence of unanimity showed that the "agency's position [that alcoholism is willful misconduct] has the necessary minimal support" to make it reasonable, but also concluded that medical judgment was unnecessary, because the "application of general societal perceptions regarding personal responsibility" supports the willful misconduct regulation. 792 F.2d at 201 (*McKelvey* Cert. Pet. 11a-12a).[8] In the majority's view, such "general societal perceptions" make the "agency's conclusion . . . a reasonable one" that is "within the bounds of reasonable interpretation of the statute [permitting delimiting date extensions]."[9] The majority therefore concluded that the VA's discrimination was based on conduct, not a handicap, and so was permissible.

The majority's conclusion is in error, for the "conduct" relied upon by the majority, presumably drinking, cannot be meaningfully distinguished from the handicap of alcoholism. As Judge Ginsburg noted in her dissent, the majority's view would preclude any challenge to discrimination based on alcoholism, because such discrimination could always be "justified"

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[8] This Court's decision in *Arline* establishes that such "perceptions," if they in fact exist, are not a legally-permissible basis for discrimination against the handicapped. *See* pp. 28-30 *infra*.

[9] 38 U.S.C. § 1662(a)(1) (1982), quoted at pp. 4-5 *supra*.

as based on conduct. 792 F.2d at 225 (*McKelvey* Cert. Pet. 21a). Yet Congress, the Attorney General, and numerous courts have determined that alcoholism is a handicap protected from discrimination by § 504 of the Rehabilitation Act.[10] By focusing on the physical act of taking a drink, the majority would allow the VA to ignore the causative disabling condition, alcoholism. The majority thus completely undermines the statutory protections afforded alcoholics by permitting the VA by regulation to classify alcoholism as conduct.[11] Section 504 prohibits limitation of eligibility for federal programs because of an individual's handicap, but through the willful misconduct regula-

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[10] *See* pp. 20-21 *supra*.

[11] The willful misconduct regulation conflicts not only with the Rehabilitation Act, but also with other VA regulations. For example, the VA's regulations implementing the Rehabilitation Act for organizations receiving VA assistance define alcoholism as a handicap, 38 C.F.R. § 18.403(j)(2)(i)(C) (1986), and prohibit recipients of VA assistance from denying "a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others." 38 C.F.R. § 18.404(b)(1)(i) (1986).

Aside from this obvious inconsistency, the willful misconduct regulation does not even comport with the VA's more general regulations defining willful misconduct. Thus, VA regulations define "willful misconduct" as "an act involving conscious wrongdoing or known prohibited action," which "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n) (1986). *See* pp. 5-6 *supra*. VA regulations specifically recognize that the willful misconduct regulation is inconsistent with the more general definition of willful misconduct. 38 C.F.R. § 3.301(c) (1986) (the more general definition is "modified" by the willful misconduct regulation).

tion, the VA achieves just such a result. The regulation accordingly cannot stand.[12]

The D.C. Circuit attempted to justify the willful misconduct regulation by asserting that it "affects merely the exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because it applies not to the educational benefits program in its entirety, but only to the educational benefits program after ten years has elapsed.[13] 792 F.2d at 201 n.3 (*McKelvey* Cert. Pet. 12a-13a n.3). In response to this argument, Judge Ginsburg observed that:

> the notion that the educational benefits program somehow becomes a new and different program after ten years defies common sense and common use of the term 'program.' Moreover, like the majority's argument that discrimination against alcoholics is appropriately characterized as discrimination on the basis of conduct, the majority's inclination

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[12] By invalidating the willful misconduct regulation, the Court would leave untouched the statutory provision permitting delimiting date extensions. In *Traynor*, Judge Cooper noted that "there is no conflict between the two statutes, *i.e.*, the willful misconduct statute, 38 U.S.C. § 1662(a)(1) , and § 504 of the Rehabilitation Act, 29 U.S.C. § 794." 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a).

[13] This exclusion is achieved not by federal statute or executive order, but impermissibly by regulation. *See* 28 C.F.R. § 41.51(c) (1986) ("The exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Rehabilitation Act]).

> narrowly to define "program" ultimately will enfeeble the concept discrimination. If the VA may explain every act of discrimination against alcoholics in favor of other handicapped persons as simply the exclusion of alcoholics from a narrowly-defined program, discrimination against alcoholics can never occur in any program for the handicapped.

792 F.2d at 209 (*McKelvey* Cert. Pet. 28a).

Judge Ginsburg's analysis demonstrates a major flaw in the opinion of the majority below: its reasoning is potentially limitless. Any agency could seek to define programs in such a way that alcoholism in a specific context could be called conduct, thereby permitting the agency to discriminate on the basis of alcoholism.[14] While the majority below would prefer

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[14] For example, in *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) , the court invalidated under § 504 regulations that enabled the city of Philadelphia to refuse to hire recovered alcoholics or drug abusers for city jobs, including jobs supported by the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 841 *et seq.* (1982) (repealed 1982) . But the decision below would permit a program sponsor to adopt regulations calling alcoholism "conduct," and thus discriminate against alcoholics on that basis.

The problem is not insignificant. There are millions of alcoholics in the United States today. A report by the National Research Council estimated that in the years 1971-1976, 1.2% of the adult population, nearly 3 million people, consumed more than 5 ounces of alcohol daily. National Research Council, Alcohol and Public Policy: Beyond the Shadow of Prohibition, p. 28, National Academy Press (1981). *See* J.A. 56, 63 ¶ 10 (Affidavit of Sheldon Zimberg). The protections afforded alcoholics by the Rehabilitation Act have a positive impact on the lives of many people, and should not be destroyed by the strange judicial construction of the majority below.

to call alcoholism conduct, Congress has concluded that alcoholism is a handicap under the Rehabilitation Act. The regulation upheld by the decision below effectively nullifies the decision of Congress, and therefore cannot stand.

C. The D.C. Circuit's Decision Conflicts With This Court's Decision in *School Board of Nassau County v. Arline*

The decision of the D.C. Circuit majority in *McKelvey* conflicts with the decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). In *Arline*, the Court held that persons with contagious diseases were handicapped within the meaning of the Rehabilitation Act, and remanded the case to the district court for an inquiry into whether the petitioner was "otherwise qualified" for the position she sought. The Court noted that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129.

Here, the willful misconduct regulation is supported only by prejudice and ignorance. As the brief *amicus curiae* of the American Medical Association and American Psychiatric Association demonstrates, there is widespread agreement in the medical community that alcoholism is a medical condition requiring treatment, not condemnation. Such was not always the case, and particularly so when the VA first announced in 1931 that alcoholism would be defined as willful misconduct. J.A. 133.[15] Since that time, when Pro-

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[15] The willful misconduct regulation does not explicitly state that "alcoholism is willful misconduct," though the VA has consistently interpreted it in that fashion. *See* J.A. 112-13. Thus,

hibition was the law of the land, the VA policy has been maintained with only slight modifications. J.A. 138.[16]

The sweeping classification of alcoholism as willful misconduct may have reflected the views of an earlier era, but advancements in medical understanding of alcoholism have shown that view to be wrong. Yet it

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the 1931 Administrator's decision that led to the current regulation states:

> The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whisky or other liquor, is not in and of itself willful misconduct. However, in the event other circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to that effect, the element of willful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, willful misconduct would undoubtedly inhere in the act.

J.A. 135-136. This language could reasonably be read to define as willful misconduct a disability resulting from a car wreck during a night out "drinking with the boys," but the concept that alcoholics drink "for the purpose of enjoying its intoxicating effects" can endure only because of a smug, prejudiced attitude of those without the problem toward those who suffer from alcoholism.

[16] One modification is the distinction between primary and secondary alcoholism. Primary alcoholism is alcoholism not caused by an underlying psychiatric condition, while secondary alcoholism stems from a psychiatric condition. While these terms may have some medical significance, as used by the VA they primarily distinguish alcoholism which will be treated conclusively as willful misconduct (primary alcoholism) from that which will not (secondary alcoholism). *See McKelvey*, 792 F.2d at 202 (*McKelvey* Cert. Pet. 13a-14a).

is just that view, which is supported by what the majority characterizes as "general societal perceptions regarding personal responsibility," that the majority cites as adequate support for the VA's willful misconduct regulation. *See* pp. 23-24 *supra*. As the Court recognized in *Arline*, Congress' passage of the Rehabilitation Act, an enlightened measure intended to ensure that handicapped citizens receive opportunities available to others, repudiated such prejudiced attitudes as the basis for discrimination in public programs. 107 S.Ct at 1129.

Arline also undermines the D.C. Circuit majority's conclusion that the discrimination against petitioners was based on conduct, rather than their handicap, and was therefore permissible. In *Arline*, the Court refused to distinguish between the contagious effects of a disease and the disease's physical effects on its victims. 107 S.Ct. at 1128. Yet here the VA makes an analogous distinction between the physical activity that leads to intoxication, and the underlying condition of alcoholism which caused petitioners to drink. *Arline* indicates that such a distinction is not meaningful and cannot justify discrimination against handicapped individuals.

Arline confirms that the coverage of the Rehabilitation Act is broad, and that its protection extends to all persons "otherwise qualified" for the benefits they seek. 107 S. Ct. at 1130-32. Here, both district judges found that the petitioners were "otherwise qualified." Therefore, the only impediment that prevents them from obtaining benefits on a nondiscriminatory basis is the VA's willful misconduct regulation. *Arline* indicates that this regulation cannot stand.

II. SECTION 211(a) DOES NOT PRECLUDE THE FEDERAL COURTS FROM DETERMINING WHETHER THE VA'S WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT.

A. Since There Was No "Decision Of The Administrator" On The Question Of Law Presented In These Cases, § 211(a) Does Not Preclude Judicial Review

Section 211(a) of the Veterans' Benefits Law provides in pertinent part:

> the *decisions* of the Administrator on any question of law or fact *under* any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982) (emphasis added). Section 211(a) does not bar judicial review of all acts or failures to act by the VA. Rather, by its plain language, § 211 (a) applies only to "*decisions* of the Administrator."[17] Thus, at an absolute minimum, a "decision" on the question the courts are asked to review must have been made by the Administrator. The VA has agreed with this fundamental point.[18]

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[17] "Decisions of the Administrator" include decisions of the Board of Veterans' Appeals. *Traynor*, 791 F.2d at 233 (Kearse, J., dissenting) (citing 38 U.S.C. §§ 4004(a) and (b) (1982)) (*Traynor* Cert. Pet. 36a).

[18] The VA told the D.C. Circuit that "the language of section 211(a) does require that there be a decision at *some* level of the agency on the question of law or fact as to which preclusion of

In Mr. Traynor's case, the VA expressly declined to decide whether the willful misconduct regulation violates the Rehabilitation Act. The Board of Veterans' Appeals stated explicitly that the VA was not the proper forum for entertaining either constitutional or federal statutory challenges to the regulation: "[y]ou're asking us . . . to judge the regulations, to act as a court . . . . [W]e're incompetent in that jurisdiction." 791 F.2d at 233 (*Traynor* Cert. Pet. 35a-36a). In its final decision upon reconsideration, the Board indicated that it considered such challenges "beyond [its] power to decide." (*Traynor* Cert. Pet. 116a).[19]

In Mr. McKelvey's case, the VA initially disclaimed authority to decide whether the willful misconduct regulation violated the Rehabilitation Act. The VA stated in its brief to the D.C. Circuit:

> We are not pursuing the question of jurisdiction on this appeal, because we do not believe that 38 U.S.C. § 211(a) can be applied to the claim under the Rehabilitation Act . . . . We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered

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review is sought." Supplemental Brief for Appellants at 3, *McKelvey v. Turnage* (R. 12/20/85).

[19] In light of these repeated disclaimers, the Second Circuit majority obviously erred in stating that the VA "has never disclaimed its authority to determine whether its own regulations comply with federal statutes" and assuming that the Board of Veterans' Appeals had in fact applied the "regulation . . . in light of the Rehabilitation Act." 791 F.2d at 229 (*Traynor* Cert. Pet. 13a, 15a). *See id.* at 233 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 34a-35a).

> and, under existing regulations, probably had no authority to consider.

Brief for Appellant at 9-10 n.1 (R. 3/20/85), quoted in part at 792 F.2d 198 (*McKelvey* Cert. Pet. 7a).[20]

Despite the fact that the VA explicitly declined to decide the Rehabilitation Act issue in either case, both the majority in *Traynor*[21] and Judge Scalia in dissent in *McKelvey* concluded that because both petitioners were denied benefits, a "decision" had been reached and, in reaching that "decision," the VA had "necessarily decided" the Rehabilitation Act issue in denying those benefits. *McKelvey*, 792 F.2d at 209-210 (Scalia, J., dissenting in part) (*McKelvey* Cert. Pet. 30a). The discussion above demonstrates that these conclusions were clearly erroneous. Because there was no "decision" concerning the validity of the willful misconduct regulation under the Rehabilitation Act, § 211(a) does not prevent the federal courts from considering petitioners' challenges to the regulation.

B. Section 211(a) Does Not Bar Challenges To VA Regulations Under the Rehabilitation Act

Arguments seeking to limit access to the courts to challenge agency regulations must be viewed suspiciously. This Court has long honored the "strong pre-

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[20] The VA later submitted a letter from its General Counsel stating that the willful misconduct regulation comported with § 504. *See* p. 13 *supra*. However this letter is characterized, it surely was not a "decision of the Administrator" for purposes of § 211(a). The D.C. Circuit declined to recognize it as such and properly assumed jurisdiction. 792 F.2d 199 (*McKelvey* Cert. Pet. 8a). As noted above, the VA has not challenged the D.C. Circuit's assumption of jurisdiction. *See* p. 16 *supra*.

[21] *See* p. 9 *supra*.

sumption" "that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct 2133, 2135 (1986). In these cases, that presumption may be overcome only if there is "persuasive reason to believe" that Congress intended to preclude review of the validity of regulations of broad application when it enacted § 211(a). *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases); *Bowen, supra*, 106 S.Ct. 2136. "The heavy burden of overcoming this presumption rests on those who seek to insulate their actions from such scrutiny." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). At a minimum, this Court demands "reliable indicators" of Congressional intent before overturning the presumption favoring judicial review:

> [The question whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984). An examination of each of these factors in this case supports only one conclusion: Congress did not intend to prohibit a federal court challenge to the validity of the willful misconduct regulation under § 504 of the Rehabilitation Act.

1. The Express Language Of § 211(a) Does Not Prohibit A Challenge Under The Rehabilitation Act To A VA Regulation of Broad Application.

Section 211(a) precludes review only of

> "decisions of the Administrator . . . . under any law administered by the Veterans' Administration providing benefits to veterans . . .."

Section 504 of the Rehabilitation Act is not "a law . . . [that] provid[es] benefits for veterans." Rather, it is a civil rights statute that gives protection to individuals with handicaps. Nor is the Rehabilitation Act a "law administered by the Veterans' Administration." The President has designated two other federal agencies—first the Department of Health, Education and Welfare, and then the Department of Justice—as the agencies responsible for setting the standards and coordinating the implementation and enforcement of § 504.[22] *See School Board of Nassau County v. Arline*, *supra*, 107 S.Ct. at 1127. Although the VA must comply with the Rehabilitation Act, just as it must comply with the Constitution, it no more "administers" the Act than it "administers" the Constitution. *See Traynor*, 791 F.2d at 232-33 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 32a-33a).[23]

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[22] In 1976, the President designated HEW as the agency responsible for setting government-wide standards for implementing § 504 and for coordinating its implementation. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1977) . In 1980, that Executive Order was replaced by Exec. Order No. 12,250, 3 C.F.R. 298 (1981), which transferred the authority for coordinating and enforcing § 504 to the Department of Justice.

[23] The dissent in *Traynor* noted that the majority "confuses administration with compliance" in regard to the VA's responsibilities under the Rehabilitation Act. 791 F.2d at 232-33 (*Traynor* Cert. Pet. 32a-33a). That confusion would permit the VA or other agencies willfully to ignore or violate an important federal law, refuse to hear an appeal of its failure to follow the law, and then insulate that defiance by denying court access to

For these reasons, by its plain language § 211(a) does not bar judicial consideration of petitioners' challenges to the willful misconduct regulation. This is confirmed by this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson*, the Court made clear that only a narrow category of "decisions" falls within § 211(a)'s prohibition against judicial review: those "made by the Administrator in the . . . application of a particular provision of the [veterans' benefits] statute to a particular set of facts." 415 U.S. at 367.[24]

A determination by the VA about the validity of the willful misconduct regulation would not be a "decision" within the meaning of § 211(a) because it requires a legal determination under the Rehabilitation Act, rather than under the Veterans' Benefit Law. It also does not require a decision concerning a "particular set of facts." Rather it involves a challenge to a regulation that conclusively determines the outcome of an entire class of veterans' benefit claims by prohibiting any individualized application of the Veterans' Benefits Law to the facts underlying such claims. Only an interpretation of § 211(a) that permits judicial scrutiny of VA regulations whose validity is challenged under statutes which do not pertain to

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those the law was designed to protect. Such a result violates fundamental principles of fairness.

[24] In *Johnson*, this Court noted that its reading of § 211(a)'s scope was "supported by the administrative practice of the Veterans' Administration", in administrative appeals identical to those of the petitioners in this case, of "expressly disclaim[ing] authority to decide constitutional questions". 415 U.S. at 367-68. Similarly, the VA consistently has disclaimed authority to decide federal statutory challenges to the validity of its regulations.

veterans' benefits fairly takes into account the full text of § 211(a) and *Johnson's* interpretation of it.

2. "Decisions" And "Regulations" Have Separate And Distinct Meanings In § 211(a) And In The Statutory Scheme Of The Veterans' Benefits Law.

A challenge to a VA regulation is not a challenge to a "decision of the Administrator," and therefore is not barred by § 211(a). The terms "decisions" and "regulations" are not defined under the Veterans' Benefit Law, but those terms have always been used distinctively in that law and are intended to mean different things.

The predecessor of § 211(a) is found at § 5 of the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8 (1933). As originally enacted, § 5 provided:

> All decisions rendered by the Administrator of Veterans' Affairs under the provisions of [Title I of the Economy Act], or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

48 Stat. 9. The Economy Act delegated to the President the authority to promulgate regulations setting veterans' pensions.[25] It then immunized from judicial review only those decisions of the Administrator that applied the statute *and* regulations to the unique facts

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[25] Title I authorized the President, not the VA, to issue these regulations. Congress did not use "regulations" and "decisions" synonymously. *See* §§ 3, 4, 7-9, 48 Stat. 8, 9-10 (1933).

of each individual veteran's claim. *See* §§ 3-4 of the Economy Act, 48 Stat. 9-10 (1933); *see also* n.27 *infra*.

In the various versions of the preclusion-of-review provision enacted since 1933, Congress has never altered the original and distinctive meanings of the words "decisions" and "regulations." Indeed, Congress' intent to maintain its original distinction between "decisions" and "regulations" is clear from another key provision of the Veterans' Benefits Law whose precursors date back to 1933.[26]

Section 4004 of the Veterans' Benefits Law defines the jurisdiction of the Board of Veterans' Appeals, the body which actually makes the "decision of the Administrator" in all veterans' appeals. It provides in relevant part:

> (a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.
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> * * *
>
> (c) The Board *shall be bound in its decisions by the regulations of the Veterans' Administration*, instructions of the Admin-

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[26] Congress' retention of the same language in earlier and later versions of a statute provides strong evidence of its intent to retain the original meaning of that language. Bell v. New Jersey, 461 U.S. 773, 784 (1983). Similarly, words used with the same meaning in related provisions of a single statute are a useful guide to statutory construction. Bob Jones University v. United States, 461 U.S. 574, 587 & n.10 (1983).

> istrator, and the precedent opinions of the chief law officer.

38 U.S.C. § 4004(a), (c) (1982) (emphasis supplied). Thus § 4004 distinguishes between "decisions" in individual cases and "regulations" or other rules of broad application by which the Board is bound in reaching its decisions. Only the former types of determinations constitute "decisions of the Administrator" that are immunized from review under § 211(a).

3. The Legislative History Of § 211(a) And Its Predecessors Confirms That Congress Intended To Preclude Judicial Review Only Of Individual Benefits Determinations And Not Of Regulations

Since Congress enacted the first version of § 211(a) in 1933, it has consistently made clear its unwavering intention to immunize from judicial review only decisions applying the veterans' benefits laws and regulations to the particular facts of each veteran's case. It is equally clear that Congress did not intend to immunize from judicial scrutiny VA regulations such as the one challenged here.

The legislative history of the first version of § 211(a), § 5 of the Economy Act of 1933, is almost non-existent. *Johnson v. Robison*, *supra*, 415 U.S. at 369. The history does, however, confirm that Congress focused on barring review of decisions about individual veterans' claims that the Administrator rendered when "acting under [the] regulations and rates" established by the President.[27] In the various

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[27] 77 Cong. Rec. 254 (1933) (remarks of Sen. Harrison) ("Section 5 gives to the Administrator only such power as the Administrator now has. The only purpose of this section is that, after the President has announced the regulations [establishing

versions of the statute enacted between 1933 and 1970, when Congress last amended the preclusion section, that focus never shifted.[28]

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pension requirements and rates] . . . ., acting under those regulations and rates, whatever decision the Administrator shall make shall be final.").

[28] In 1940, the Congress added a new section to the former Pension, Bonuses and Relief Act, part of which concerned veterans' pensions. § 11, 54 Stat. 1197 (1940). This amendment, which was later consolidated with § 5 of the Economy Act to become the preclusion-of-review provision for purposes of the veterans' law, was, in the words of the VA, "similar to that contained in Section 5, Public L. No. 2, Seventy-third Congress." 86 Cong. Rec. 13,490 (1940); its only purpose was to bring uniformity to the various veterans' laws. *See, e.g.*, 86 Cong. Rec. 13,490 (remarks of Mr. Rankin), 86 Cong. Rec. 13,491 (remarks of Mrs. Rogers).

In 1957, the Congress, in consolidating the veterans' benefit laws, also consolidated the former preclusion-of-review provisions in one section. § 211, Veterans' Benefit Law of 1957, 71 Stat. 83, 92 (1957). As the Court noted in *Johnson, supra*, 415 U.S. at 369 n.10, the legislative history of the amendment is not instructive. Nothing, however, indicated that Congress intended to expand the scope of the preclusion section. *See* H.R. Rep. No. 279, 85th Cong., 1st Sess. 1 (1957); S. Rep. No. 332, 85th Cong. 1st Sess. 1 (1957).

The last amendment to the veterans' preclusion-of-review clause, and the current version of § 211(a), was enacted in response to a series of cases decided by the D.C. Circuit. Those cases had limited the scope of the section to initial claims for benefits, but held that suits challenging the propriety of benefit terminations were not barred. Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967); Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962); Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1958). Congress changed § 211(a) in 1970 to its present form expressly to reject the "fairly tortured construction adopted by the court of appeals in the *Wellman*, *Thompson*, and *Tracy* holdings," H.R.

In fact, Congress has reconsidered the preclusion section on a number of occasions in recent years. The record of those deliberations reveals that, in declining to expand its scope, Congress understood not only that an increasing number of federal courts of appeals had found § 211(a) not to bar review of regulations challenged on constitutional or statutory grounds, but also that the VA had represented consistently that § 211(a) does not preclude such review.[29] This Court has held repeatedly that Congressional awareness of the consistent administrative practice of the agency charged with administering a statute is a significant source for understanding Congressional intent. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 787 (1983); *Andrus v. Shell Oil Company*, 446 U.S. 657, 666 n.8, 667-672 (1980).

Rep. No. 1166, 91st Cong., 2d Sess. 11 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News p. 3723, 3730-31; and to "preserve [§ 211(a)'s] two [original and] primary purposes," *Johnson, supra*, 415 U.S. at 371. *See* pp. 45-46 *infra*. The authors and sponsors of the 1970 amendment explained its purpose solely in terms of restoring uniformity to the "decisions in individual cases," 116 Cong. Rec. 26,489-90 (daily ed., July 30, 1970) (remarks of Mr. Teague, Chairman of the House Comm. on Veterans' Affairs). *See also* 116 Cong. Rec. 19,733-35 (daily ed., June 16, 1970) (remarks of Mr. Teague).

[29] *See, e.g.*, Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings on S.349 Before the Senate Committee on Veterans' Affairs, 97 Cong., 1st Sess. 130, 131 (1981) (Statement of VA Acting General Counsel Robert Coy); Judicial Review of Veterans' Claims: Hearings Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs, 96th Cong., 2d Sess. 84 (1980) (Statement of VA General Counsel Guy McMichael); *see also* pp. 42-45 *infra*.

Congress was advised as early as 1952 of the VA's position that the precursor of § 211(a) was designed only to bar review of individual fact-bound claims.

> In the adjudication of compensation and pension claims a wide variety of medical, legal, and other technical questions constantly arise which require the study of expert examiners of considerable training and experience, and which are not readily susceptible of judicial standardization. Among other questions to be determined in the adjudication of such claims are those involving length and character of service, origin of disabilities, complex rating schedules, a multiplicity of medical and physical phenomena for consideration intercurrently with such schedules, and the application of established norms to the peculiarities of the particular case. These matters have not been considered by the Congress or the courts appropriate for judicial determination but have been regarded as apt subjects for the purely administrative procedure.

Hearings on H.R. 360, 478, 2442 and 6777 Before a Subcommittee of the House Committee on Veterans' Affairs, 82nd Cong., 2d Sess., 1962-63 (1952) (discussed in *Johnson v. Robison*, 415 U.S. 361, 371 & n.12 (1974)).

More recently—in 1982 and again in 1984, when Congress considered legislation that ultimately resulted in the Veterans' Dioxin and Radiation Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)—the VA's consistent position on the scope

of § 211(a) influenced Congress not to amend that section.[30] In an exchange of letters with Senator Cranston of the Senate Committee on Veterans' Affairs, Robert P. Nimmo, then VA Administrator, explained the VA's position regarding the meaning and scope of § 211(a) as follows:

> I continue to believe, as I stated in a written response to your question at my confirmation hearing, that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations, and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."
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> Section 211(a) has been properly limited by the courts so that *it does not protect every decision, policy, or action of the VA from*

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[30] While post-enactment Congressional action or inaction must be treated cautiously in determining the intention of a previous Congress, *e.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754, 778 (1981), post-enactment statements may indicate how key members of Congress interpret particular provisions of a statute. *See e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984); Bell v. New Jersey, 461 U.S. 773, 784-87 (1983); Andrus v. Shell Oil Co., 446 U.S. 657, 668-72 (1980). In addition, this Court has recognized the significance of evidence that Congress has reconsidered statutory provisions, but chosen not to alter them because it was aware of, agreed with, and relied upon prevailing interpretations of those laws by courts or the federal agencies charged with their administration. *See, e.g.*, Lindahl v. Office of Personnel Management, 470 U.S. 768, 782 n.15 (1985); Bob Jones University v. United States, 461 U.S. 574, 606-608 (1983) (Powell, concurring in part).

> *judicial scrutiny*. Those Agency rules and procedures of broad and binding application which affect the *rights of a number of claimants to VA benefits are not protected by section 211(a)*. The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however
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> . . . .
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> Section 211(a) will not be raised by the Veterans Administration, nor by Department of Justice at our recommendation, when there is either a clear challenge to the constitutionality of a statute, regulation or procedure or *an allegation that a regulation or procedure is inconsistent with law*. This is the general policy you cite in your letter, which was enunciated by the Acting General Counsel in his written response following the hearing of July 15, 1981, on S.349.

Letter from Robert P. Nimmo to Senator Alan Cranston, March 24, 1984 (*reprinted in full* at 130 Cong. Rec. S6160 (daily ed. May 22, 1984) (emphasis supplied).

Moreover, during the floor debate about the Veterans' Dioxin Act, several Senators on the Veterans' Affairs Committee stated that it was understood among the Conference Committee negotiators that § 211(a) permitted judicial review of regulations promulgated by the Administrator. *See, e.g.*, 130 Cong. Rec. S13,591, S13,598 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston); *id.* at S13,608 (remarks of

Sen. Spector); *id.* at S13,610 (remarks of Sen. Mitchell).

Even more recently, the VA reaffirmed that position:

> "[T]he VA regards its regulations and substantive agency actions of broad application to be subject to judicial review. Accordingly, there are many instances in which § 211(a) of Title 38 United States Code, does not preclude judicial review, at least with respect to these questions of law."

H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives, 99th Cong., 2d Sess., Vol. II, 328 (1986).

Thus, the legislative history of § 211(a) and its predecessors and the position of the VA itself clearly and consistently support the conclusion that § 211(a) does not prohibit judicial scrutiny of the VA's willful misconduct regulations.

C. Permitting Review of Challenges To VA Regulations Will Not Impose Burdensome And Technical Litigation Upon The Courts, And Will Further The Goals Of The Rehabilitation Act.

1. Allowing Review Will Not Thwart The Purposes Of § 211(a).

In *Johnson v. Robison*, this Court concluded that Congress intended § 211(a) to serve two primary purposes:

> (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and

> (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. at 369, 370 (footnotes omitted). Permitting judicial review of a challenge under the Rehabilitation Act to the willful misconduct regulation is consistent with these objectives.

Four circuit courts have concluded that § 211(a) does not bar review of statutory and constitutional challenges to VA regulations. Those courts uniformly have found that the policies underlying § 211(a) would not be impaired by permitting review,[31] and the experience in each circuit has borne this out. Few lawsuits challenging VA regulations have been filed,[32] and

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[31] *See* Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); and Wayne State University v. Cleland, 580 F.2d 627 (6th Cir. 1978). The Second Circuit attempted to distinguish these cases on the ground that they were brought by "educational institutions interested in the overall administration of the VA educational benefits program," rather than individual veterans. 791 F.2d 230 (*Traynor* Cert. Pet. 18a-19a). This distinction is factually incorrect, for individual veterans were among the plaintiffs in *Wayne State*, 590 F.2d at 628 n.1 , and in *Merged Area X (Education)*, 604 F.2d at 1077. It also ignores the fact that the ultimate beneficiaries of suits brought by educational institutions are individual veterans, and that the invalidation of the willful misconduct regulation will benefit not only petitioners but other veterans as well.

[32] By petitioners' count, two such suits have been filed in the Fourth Circuit, *see* American Federation of Government Employees, AFL-CIO v. Nimmo, 711 F.2d 28 (4th Cir. 1983) and

an examination of those suits indicates that they have not involved the courts in "technical and complex determinations and applications of Veterans' Administration policy." Rather, these suits have raised purely legal issues which the courts, not the VA, are uniquely competent and qualified to decide.[33]

2. Allowing Review Will Further The Goals Of The Rehabilitation Act And Will Ensure That All Persons Enjoy The Protection Of The Laws.

Allowing judicial review of the VA regulation challenged in this case will enhance two vital national policies. The first of these is the protection of the handicapped, including those suffering from alcoholism. The United States government formally has recognized that alcoholism is an illness to be treated rather than conduct to be condemned. This national policy was first enunciated by Congress in the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. No. 91-616, 84 Stat. 1848 (1970), 42 U.S.C. § 4541 (1982) ("Comprehensive Alcoholism Act"). The policy was reaffirmed by the passage of the Rehabilitation

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Plato v. Roudebush, 397 F.Supp. 1295 (D. Md. 1975); one in the Sixth Circuit, *see* Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985); two in the Seventh Circuit, *see* Taylor v. United States, 385 F. Supp. 1035 (N.D. Ill. 1974), *vacated and remanded*, 528 F.2d 60 (7th Cir. 1976), and Arnolds v. Veterans' Administration, 507 F. Supp. 128 (N.D. Ill. 1981); and two in the Eighth Circuit, *see* Burns v. Nimmo, 545 F. Supp. 544 (N.D. Iowa 1982) and Waterman v. Roudebush, No. 4-77-Civ. 70 (D.Minn. 1979).

[33] Petitioners' cases are good examples of such suits. They have involved purely legal questions suitable for prompt judicial resolution, and were both decided on motions for summary judgment.

Act, and its nondiscrimination provision codified at § 504. Yet, as described above, *see* pp. 19-30 *supra*, the willful misconduct regulation tramples upon the rights of alcoholics, as handicapped citizens, to enjoy the benefits available to others. If the willful misconduct regulation is immune from court review, the VA will continue to be free to ignore the Congressional commands set forth in the nondiscrimination provision of the Rehabilitation Act.

The second important national policy that would be advanced by permitting review here is " '[t]he very essence of civil liberty . . . the right of every individual to claim the protection of the laws.' " *Bowen v. Michigan Academy of Family Physicians, supra*, 106 S. Ct. at 2136 (quoting Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). This right can have no meaning unless those entitled to claim the protection of the laws are afforded a forum in which to seek remedies for their violation. *Id.*, 106 S. Ct. at 2136.

This Court has protected this interest by presuming that Congress intends to permit judicial review of administrative agency action *unless* it expresses a clear intent to the contrary. As discussed previously, since Congress has not expressed such an intent with respect to VA regulations, this presumption must prevail here.

Moreover, divesting the courts of jurisdiction would leave petitioners without any forum to hear their civil rights claims, for the Board of Veterans' Appeals has disclaimed authority to decide this issue. *See* pp. 31-33 *supra*.

Under similar circumstances, this Court repeatedly has found it appropriate to subject binding regulations

to judicial review, notwithstanding preclusion statutes similar to § 211(a), if divesting the courts of jurisdiction would leave no forum at all in which to consider and decide important questions of law. *See, e.g., Bowen, supra*, 106 S. Ct. at 2138; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 106 S. Ct. 2523, 2530 (1986) (applying "frequently upheld" principle that, when individual eligibility determinations of benefit programs are left exclusively to state judicial and administrative processes, "claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (citations omitted); *see also Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986) (decision holding process under Parole Act not shielded from review despite preclusion provision). This Court has not precluded review of regulations where no other relief was available, *see, e.g. Bowen, supra*, 106 S. Ct. at 2140-41, and should not permit that to happen here.

CONCLUSION

For the reasons discussed above, the Court should reverse the decisions of the Second Circuit in *Traynor* and the D.C. Circuit in *McKelvey* and invalidate the VA's willful misconduct regulation because it conflicts with § 504 of the Rehabilitation Act. Based on the findings of the district courts below, the Court should remand these cases to the respective Courts of Appeals with instructions that the courts order the VA to make petitioners' remaining educational benefits available to them.

Respectfully submitted,

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